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The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes after September 11, 2001

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The Merging Of The Anti-Money Laundering And Counter- Terrorism Financial Enforcement Regimes After September 11, 2001

By
Bruce Zagaris*

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INTRODUCTION

Globalization, technology, free trade, and consumerism have increasingly brought the world together. Today, individuals, organizations, and governments can move people, goods, services, and capital almost as if there were no international borders. Criminals, both petty and transnationally organized, can and do easily take advantage of the ability to do business anyplace, from anywhere, instantaneously.

Governments and law enforcement agencies have struggled to cope with the pressures of international crimes such as counterfeiting, illegal immigration, plane and vehicle theft, stolen art, and illicit trafficking of arms, nuclear materials, narcotics, aliens, and so on. Their failures empower mom-and-pop gangs, whether they are Latin American drug lords or Russian mafia, as well as more established groups, such as Italian organized crime, the Yakuza, and their U.S. counterparts, who are able to enter new markets and participate in new products and businesses, either alone or in joint ventures with other gangs. As politicians struggle to explain their inability to effectively control the growth of transnational crime, the rhetoric and efforts to develop an international money movement enforcement regime have increased.

Now law enforcement is fighting back. By designing and elaborating new enforcement and international cooperation regimes, agents hope to globalize and modernize laws and practices to the point where they can compete with criminals on an even playing field. One important area of cooperation has been the regulation of the international movement of money, for which national and international laws are relatively recent. These anti-money laundering (AML) laws reflect a steadfast commitment by world governments to combat illicit drug trafficking and other forms of criminal activity, especially as conducted by organized crime.

A major U.S. response to the terrorist attacks of September 11, 2001, was to pursue the money used by the perpetrators so that their supporters' ability to conduct future attacks would be diminished. The Bush administration initiated a series of agreements in international organizations, issued executive orders, and quickly passed sweeping legislation to curb the financing of terrorism. These counter-terrorism financial enforcement (CTFE) measures merged with the AML regime, with which they are closely linked by the similarity of their goals. This paper focuses on the new AML/CTFE regime, and how the United States and various intergovernmental organizations have extended existing AML laws and conventions to cover additional persons, products and situations, and to encompass new strategies and implementation mechanisms to cover CTFE concerns as well. As transnational crime and terrorism remain threats to national and personal security, the laundering of funds to support them will increase and the new AML/CTFE regime will expand accordingly, gathering a momentum of its own and interacting with other areas of law.

Part I of this article reviews some of the major U.S. government statutes and regulations in the AML realm, describing how they laid out and expanded

the due diligence requirements all financial institutions must meet. It goes on to detail how these AML measures were merged into a new AML/CTFE regime following the terrorist attacks of September 11, 2001. In particular, I examine the pertinent executive orders and infrastructural changes, as well as the enactment of the USA PATRIOT Act. Part II identifies the key international organizations whose work has catapulted this regime onto the worldwide stage, including global institutions (like the United Nations and the Financial Action Task Force on Money Laundering) and regional ones (such as those in Europe and the Americas). Part III analyzes some enforcement actions undertaken to combat money laundering and terrorist financing with a focus on the challenges and difficulties they present for law enforcement officials. In Part IV, I describe the ways in which the new AML/CTFE regime has affected my job as an international corporate lawyer and offer suggestions on how to improve the regime.

I.

THE U.S. ANTI-MONEY LAUNDERING REGIME

Since the initiation of international anti-money laundering (AML) efforts in the mid-1980's, various substantive mandates have been established.¹ Nations are now required to criminalize money laundering activities through the proactive tracing, freezing, and seizing of the instrumentalities and proceeds of serious crime, and the forfeiting of them to law enforcement personnel.² Financial institutions and their employees must practice what is known as due diligence. They are bound by law to help law enforcement officials by "knowing their customers"; identifying and reporting suspicious transactions to authorities; training employees; hiring compliance officers; and obtaining outside audits of their compliance with AML standards. Neither governments nor financial institutions may cite secrecy or privacy as a reason for refusing to follow any of these obligations.

The United States spurred the growth of the AML regime early on and has been a leader in its expansion, both to cover more entities and activities, as well as nations. Its main AML provisions are found in Titles 12, 18 and 31 of the U.S. Code.

The Bank Secrecy Act of 1970 (BSA),³ a precursor to AML efforts, was intended to deter money laundering and the use of secret foreign bank accounts by improving the detection and investigation of criminal, tax, and regulatory

1. For background on some of the early AML law, see Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy*, 19 BROOK. J. INT'L L. 871, 872-78 (1993).

2. The purpose of forfeiture is to disable the criminal from continuing to perpetrate crimes and to distribute to law enforcement and/or victims the ill-gotten gains. Indeed, a good portion of the budgets of law enforcement agencies in the U.S. and other countries comes from forfeiture, and an enormous cottage industry dealing with the freezing and forfeiture of assets has arisen. For background on AML forfeiture laws, see DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1998).

3. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 18 U.S.C., and 31 U.S.C.).

violations. It demanded an investigative “paper trail” for large currency transactions by establishing regulatory reporting standards and requirements, and imposed civil and criminal penalties for noncompliance.⁴

The Money Laundering Control Act of 1986,⁵ part of the Anti-Drug Abuse Act of 1986,⁶ created three new criminal offenses for money laundering activities by, through, or to a financial institution: knowingly helping launder money; knowingly engaging in (including by being willfully blind to) a transaction of more than \$10,000 that involves property acquired through criminal activity; and structuring transactions to avoid the BSA reporting requirements.

The Anti-Drug Abuse Act strengthened the AML scheme by significantly increasing civil and criminal sanctions for laundering crimes and BSA violations, including forfeiture of “any property, real or personal, involved in a transaction or attempted transaction” in violation of the reporting laws;⁷ requiring more precise identification and recording of cash purchases of certain monetary instruments; allowing the Department of the Treasury to obligate financial institutions to file additional, geographically targeted reports;⁸ requiring Treasury to negotiate bilateral international agreements covering the recording of large U.S. currency transactions and the sharing of such information; and increasing the criminal sanctions for tax evasion when money from criminal activity is involved.

The Housing and Community Development Act of 1992⁹ allows regulators to close or seize financial institutions that violate AML statutes by suspending or removing institution-affiliated parties who have violated the BSA, or been indicted for money laundering or criminal activity under it, and appointing a conservator or receiver, or by terminating the institution’s charges. The Act further forbids any individual convicted of money laundering from unauthorized participation in any federally insured institution.

Additionally, the Act requires Treasury to issue regulations compelling national banks and other depository institutions to identify which of their account holders (other than other depository institutions or regulated broker dealers) are non-bank financial institutions such as money transmitters or check cashing services. Pursuant to the Act, Treasury, along with the Federal Reserve, promulgated regulations obligating financial institutions and other entities that cash checks, transmit money, or perform similar services to maintain records of domestic and international wire transfers so that these can be made available for law enforcement investigations. The Act also established a BSA Advisory

4. See, for example, I.R.S. CURRENCY TRANSACTION REPORT FORM 4789, which requires banks to report any transfer of funds in an amount greater than \$10,000. In some instances, this monetary threshold can sink as low as \$3,000. 31 C.F.R. § 103.29 (2003).

5. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 18 U.S.C. §§ 1956-57).

6. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S.C.).

7. 31 U.S.C. § 5317(c) (2003).

8. See 31 C.F.R. § 103.26 (2003).

9. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of the U.S.C.).

Group that includes representatives from the departments of Treasury and Justice and the Office of National Drug Control Policy and other interested persons and financial institutions. The group's main goal is to develop harmonious private-public cooperation to prevent money laundering.

The Act also gave Treasury the authority to require financial institutions to adopt AML programs that include internal policies, procedures, and controls; designation of a compliance officer; continuation of an ongoing employee training program; and an independent audit function to test the adequacy of the program. Financial institutions and their employees are also required to file suspicious activity reports on transactions relevant to possible violations of law or regulations. However, the Act protects institutions and their employees from civil suits arising from such reports. The American Bankers' Association and the banking industry had long sought such a safe harbor.¹⁰ Yet a financial institution or employee may not disclose to the subject of a referral or grand jury subpoena that a criminal referral has been filed or a grand jury investigation has been started concerning a possible crime of money laundering or violation of the BSA. Employees who improperly disclose information concerning a grand jury subpoena for bank records are subject to prosecution.

Together, the above-mentioned requirements comprise the due diligence standards imposed on institutions covered by AML laws.¹¹ They represent far-reaching mandates of information-sharing between private entities and governmental law enforcement agencies. They override privacy statutes in the name of enhanced crime-fighting capabilities. They also erode the contractual and ethical principles of privacy and confidentiality that are important to banks, financial institutions and intermediaries, as well as professionals involved in the international transfer of wealth.¹²

Thus, when new regulations were proposed in 1998 that would have required banks and eventually other financial institutions to develop "Know Your Customer" programs,¹³ the industry balked. Bankers knew what broad implications for private banking and offshore accounts the imposition of such requirements would have in forcing them to design, implement, and regularly update and adjust their "Know Your Customer" internal control systems. Due to enor-

10. For more information on the ABA's involvement in the U.S. AML scheme, see ANTONIO CALZADA ROVIROSA ET AL., *ANTI-MONEY LAUNDERING AND ANTI-TERRORIST FINANCING POLICY IN THE POST-SEPTEMBER 11TH ERA: A PRELIMINARY ANALYSIS OF THE IMPACT ON FINANCIAL INSTITUTIONS IN THE UNITED STATES* 4.2.1 (2002).

11. Other statutes also added to the standards of due diligence. See, e.g., Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. 105-310, 112 Stat. 2941 (requiring the Treasury to work with state and local officials and to plan and implement a national AML strategy).

12. See Antony G.D. Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT'L L. 879, 927-29 (1999).

13. The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision simultaneously proposed substantially similar rules. See, e.g., Know Your Customer, 63 Fed. Reg. 67536 (proposed Dec. 7, 1998).

mous opposition from an unusual coalition of private sector groups from both the far left and far right, the proposed regulations were withdrawn.¹⁴

But not for long. Just two and a half years later, the USA PATRIOT Act¹⁵ amended section 352 of the BSA, requiring financial institutions to practice enhanced due diligence on high-risk products, including those aimed at servicing persons on certain lists of designated terrorists and Senior Foreign Political Figures (also known as Politically Exposed Persons); private banking clients; certain financial intermediaries; foreign shell banks; foreign correspondent accounts; as well as transactions with non-cooperative countries and territories.¹⁶ Although not quite as stringent as the earlier proposed regulations would have been, the new requirements were similar in many respects and indeed are often referred to as “Know Your Customer” rules.¹⁷

American leadership on the international financial enforcement front peaked in 2001 with new withholding regulations that had a dramatic impact on foreign investment in the United States. They required foreign investors to reveal the ultimate beneficial ownership of complex structures that include multiple layers of businesses or else incur a 31% withholding tax on all receipts from their U.S. investments, including dividends, capital gains, royalties, and interest.¹⁸ Fiduciaries and their counsel had to review over 200 pages of extremely complex rules that distinguish among complex, simple, and grantor trusts and repeatedly cross-reference various sections of the Internal Revenue Code and Internal Revenue Service regulations.¹⁹ Understanding the dense and complicated language was all the more difficult for non-English speakers. Hence, there arose a proliferation of model “Know Your Customer” agreements with countries less than ninety days before the regulations took effect.²⁰

Banks and fiduciaries also needed to enforce the Qualifying Intermediary Regulations by implementing a new bureaucracy, complete with regular audits

14. See, e.g., Know Your Customer, 64 Fed. Reg. 14845 (withdrawn Mar. 29, 1999); Robert O’Harrow, Jr., *Disputed Bank Plan Dropped*, WASH. POST, Mar. 24, 1999, at E1.

15. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

16. The FATF later incorporated the idea into its 2003 revision of its Recommendations. See Press Release, Organisation for Economic Co-operation and Development, New Anti-Money Laundering Standards Released (June 20, 2003), available at http://www.oecd.org/document/25/0,2340,en_2649_201185_2789401_1_1_1_1,00.html.

17. See BASEL COMMITTEE ON BANKING SUPERVISION, CUSTOMER DUE DILIGENCE FOR BANKS (2001); BASEL COMMITTEE ON BANKING SUPERVISION, CONSOLIDATED KYC RISK MANAGEMENT (2003) (a supplement to the former).

18. See PRICEWATERHOUSECOOPERS, THE NEW US TAX WITHHOLDING RULES (2001), available at <http://www.pwcjp-tax.com/eg/library/gets/17/1707e.pdf>.

19. To better comprehend how difficult it was for the industry to understand the new rules, see CITIBANK SWITZERLAND, NEW US REGULATIONS ON US WITHHOLDING TAX ON DIVIDENDS AND INTEREST AS OF 1 JANUARY 2001 (2000), available at http://www.citibank.com/ipb/europe/pdf/swiss/non_us_help.pdf.

20. See, e.g., GUERNSEY FINANCIAL SERVICES COMMISSION, NEW U.S. WITHHOLDING TAX RULES (Aug. 1, 2000), available at <http://www.gfsc.guernseyci.com/news/archive/uswitholdingtax.html>.

by the IRS or another entity approved by the IRS.²¹ Simultaneously, they had to review, with the aid of newly-purchased bureaucratic software, the latest changes to the U.S. unilateral extraterritorial export control laws such as the Foreign Narcotics Kingpin Designation Act.²² They also had to buy separate software and hire separate compliance officers for the Office of Foreign Asset Control regulations. Indeed, due to the complex nature of the two sets of regulations, it would be foolhardy to try to implement both through one compliance officer.

II.

THE U.S. COUNTER-TERRORISM FINANCIAL ENFORCEMENT REGIME²³

Shortly after the September 11, 2001, terrorist attacks, President Bush issued a series of executive orders extending CTFE laws, which are intended to dry up the funding of terrorists and terrorist organizations. These orders were followed by the establishment of new investigative teams in numerous law enforcement agencies and the passage of the USA PATRIOT Act, which criminalized various business and financial transactions, expanded law enforcement powers, and imposed new due diligence measures on the private sector that weakened privacy and confidentiality laws and increased penalties for non-compliance with regulatory efforts.

A. U.S. Sanctions Against Terrorists and Terrorist Organizations²⁴

On September 24, 2001, President George W. Bush issued an executive order that immediately froze U.S. financial assets of, and prohibited U.S. transactions with, twenty-seven different entities.²⁵ The listed entities included terrorist organizations, individual terrorist leaders, a corporation that serves as a front for terrorism, and several nonprofit organizations.²⁶ The executive order was issued under the authority of the International Emergency Economic Powers Act²⁷, the National Emergencies Act,²⁸ section 5 of the United Nations Participation Act of 1945, as amended,²⁹ and Title 3, section 301 of the U.S. Code.

21. For a discussion of the QI regime, see TIM BENNETT, *TOLLEY'S INTERNATIONAL INITIATIVES AFFECTING FINANCIAL HAVENS* 124-25 (2001).

22. Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-20, 113 Stat. 1606, 1626-11636 (1999) (codified as amended at 21 U.S.C. §§ 1901-08).

23. This section is derived substantially from Bruce Zagaris, *The Merging of the Counter-Terrorism and Anti-Money-Laundering Regimes*, 34 L. & POL'Y INT'L BUS. 45, 48-73 (2002).

24. This section is derived substantially from Bruce Zagaris, *U.S. Initiates Sanctions Against bin Laden and Associates*, 17 INT'L ENFORCEMENT L. REP. 480 (2001).

25. Exec. Order No. 13,224, 3 C.F.R. 786, 790 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (2002).

26. Remarks on United States Financial Sanctions Against Foreign Terrorists and Their Supporters and an Exchange with Reporters, 37 WEEKLY COMP. PRES. DOC. 1364 (Sept. 24, 2001) [hereinafter Remarks].

27. 50 U.S.C. § 1701 *et seq.* (2001).

28. 50 U.S.C. § 1601 (2001).

29. 22 U.S.C. § 287(c) (2001).

President Bush also cited as legal bases United Nations Security Council Resolution 1214 of December 8, 1998, Resolution 1267 of October 15, 1999, Resolution 1333 of December 19, 2000, and Resolution 1363 of July 30, 2001.³⁰

The Administration believed, as it still does, that many of the targeted terrorist individuals and groups, such as Osama bin Laden and Al Qaeda, operate primarily overseas and have little money in the United States.³¹ As a result, it announced to foreign governments that elected not to block these terrorists' ability to access funds in foreign accounts, or to share information, that the United States has the authority to freeze a foreign bank's assets and transactions in the United States. Legally, the executive order authorizes this action by empowering the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to take whatever action may be necessary or appropriate.³²

The following persons are subject to the blocking order: (1) foreign persons determined by the Secretary of State to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of the United States, its foreign policy, economy, or citizens; (2) persons determined by the Secretary of the Treasury to be owned or controlled by, or to act for or on behalf of any persons listed under the order or any other persons determined to be subject to it; (3) persons determined by the Secretary of the Treasury to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed under the order or determined to be subject to it; (4) persons determined by the Secretary of the Treasury to be otherwise associated with those persons listed under the order or determined to be subject to it.³³

The executive order's other principal prohibitions include: (1) transacting or dealing in blocked property either by U.S. entities (including overseas branches, but not foreign subsidiaries) or within the United States; (2) for American entities and those in the United States only, evading or avoiding, or attempting to evade or avoid, any of the order's prohibitions; (3) conspiring to violate any of the order's prohibitions; and (4) making donations intended to relieve human suffering to persons listed under the order or determined to be subject to it.³⁴

Practically speaking, the terrorist sanctions introduced by Executive Order 13,224 largely overlap already existing U.S. terrorist sanctions administered by the Department of Treasury Office of Foreign Assets Control; those sanctions include the Terrorism Sanctions Regulations³⁵ and the Foreign Terrorist Organizations Sanctions Regulations.³⁶ Under the Terrorism Sanctions Regulations,

30. Exec. Order No. 13,224, *supra* note 25, at 786.

31. *Id.* at 790; Remarks, *supra* note 26.

32. Exec. Order No. 13,224, *supra* note 25, at 789.

33. *Id.* at 787.

34. *Id.* at 788. The last prohibition only applies to donations made by U.S. nationals. *Id.*

35. Exec. Order No. 12,947, 31 C.F.R. 595 (2001), *reprinted as amended* in 50 U.S.C.A. § 1701 (2003).

36. 31 C.F.R. § 597 (2001), *reprinted as amended* in 50 U.S.C.A. § 1701 (2003).

the office blocks the property of persons posing a significant risk of disrupting the Middle East peace process. Under the Foreign Terrorist Organizations Sanctions Regulations, U.S. financial institutions must block all funds in which foreign terrorist organizations have an interest. Most of the persons listed in the executive order were already listed as specially designated global terrorists under the Terrorism Sanctions Regulations or as foreign terrorist organizations under the Foreign Terrorist Organizations Sanctions Regulations.³⁷

But the new sanctions also significantly expanded on existing ones. First, they are broader than the Terrorism Sanctions Regulations because their reach extends beyond terrorists that pose a significant risk of disrupting the Middle East peace process. Second, and most importantly, the sanctions are broader than the Foreign Terrorist Organizations Sanctions Regulations in that they require blocking actions by all U.S. entities, not just financial institutions. Third, the new sanctions make it easier to designate more individuals as terrorists because anyone “associated” with terrorists can be listed. Now, the U.S. government may block the U.S. assets of, and bar U.S. market access to, foreign banks that can be linked to terrorists in any way, unless they agree to freeze those terrorists’ assets. While foreign subsidiaries appear to be beyond the scope of the executive order, any link between them and a terrorist could be treated as an “association” warranting sanction.

*B. New U.S. Investigative Teams Targeting Terrorist Financial Networks*³⁸

Creating lists of terrorists is not enough to establish a working CTFE regime; the proper infrastructure is also necessary to undertake this work successfully. To that end, the United States has established new intra- and interagency groups, such as the Policy Coordinating Committee on Terrorist Financing and Operation Green Quest, to prioritize the identification of terrorists and the blocking of their finances.³⁹ To organize the high-level effort against terrorist financing, the National Security Council established the Policy Coordinating Committee on Terrorist Financing soon after the attacks of September 11. Its purpose is to vet, approve, and recommend proposed strategic policy relating to terrorist financing, and to coordinate U.S. efforts in that direction.⁴⁰

37. For a complete and current list of individuals and organizations subject to blocking orders promulgated under the authority of Executive Order 13,224, the Terrorism Sanctions Regulations, the Terrorism List Governments Sanctions Regulations, and the Foreign Terrorist Organizations Sanctions Regulations, see OFFICE OF FOREIGN ASSETS CONTROL, WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS, available at <http://www.treas.gov/offices/eotffc/ofac/sanctions/terrorism.html> (n.d.) [hereinafter OFAC List].

38. This section is derived substantially from Bruce Zagaris, *U.S. Forms New Investigative Team to Target Terrorist Financial Networks*, 17 INT’L ENFORCEMENT L. REP. 519 (2001).

39. See, e.g., *Counterterror Initiatives in the Terror Finance Program: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 5 (2003) (statement of David D. Aufhauser, General Counsel, U.S. Department of the Treasury) [hereinafter Aufhauser]; *The Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Senate Comm. on Finance*, 107th Cong. 10 (2002) (statement of Jimmy Gurulé, Under Secretary for Enforcement, U.S. Department of Treasury) [hereinafter Gurulé].

40. See Aufhauser, *supra* note 39, at 5.

In October 2001, the U.S. Treasury Department created a new investigative team to target terrorist organizations fronting as legitimate businesses and organizations. Operation Green Quest includes prosecutors from the Justice Department as well as investigators from the Internal Revenue Service, the Customs Service, the Federal Bureau of Investigation, and other agencies.⁴¹ By taking a systems-oriented approach, the group tackles terrorist financing in a different manner from other similar agencies.⁴² It is intended to be proactive, identifying future sources of terrorist financing and dismantling their activities before they can take root.⁴³ Thus, it has targeted activities that have been connected with terrorist financing, such as counterfeiting, credit card fraud, drug trafficking, and cash smuggling, as well as illicit charities and financial institutions, and *hawalas*, the undocumented asset transfers common in the Middle East and Asia.⁴⁴

The FBI has also established its own CTFE agency: the Terrorist Financing Operations Section (TFOS) of the FBI's Counterterrorism Division. TFOS participates on the Policy Coordinating Committee on Terrorism Financing and serves as a mini-version of that body within the FBI.⁴⁵ It also provides intelligence and investigative support to field offices, other agencies, and foreign governments.⁴⁶ TFOS's work has led to many successful law enforcement actions. With the assistance of foreign authorities, TFOS disrupted Al Qaeda financing in the United Arab Emirates, Pakistan, Afghanistan, and Indonesia.⁴⁷ In the United States, TFOS efforts have resulted in the dismantling of a Hezbollah procurement and fund-raising network tied to cigarette smuggling and a charity that was sending money to Al Qaeda.⁴⁸

The establishment of the task forces illustrates the depth of the U.S. commitment to CTFE and dedication to combining the many areas of expertise of various agencies to maximize success. The government is training investigators to think in new ways, developing international relationships, and cooperating with the private sector. But these efforts face a daunting infrastructural challenge in the enormous reorganization of the U.S. government made necessary by the establishment of the Department of Homeland Security, which has led to turf wars, funding and staffing problems, and demoralization.⁴⁹ It is hoped that the new Executive Office for Terrorist Financing and Financial Crimes within the

41. Peter Spiegel, *US Team Created to Target al-Qaeda Finances*, FIN. TIMES, Oct. 26, 2001, at 5.

42. Gurulé, *supra* note 39, at 10.

43. See Spiegel, *supra* note 41.

44. *Id.*

45. *Counterterror Initiatives in the Terror Finance Program: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 2-3 (2003) (statement of John S. Pistole, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation).

46. *Id.* at 4-5.

47. *Id.*

48. *Id.* at 12.

49. See John Mintz, *Government's Hobbled Giant*, WASH. POST, Sept. 7, 2003, at A1.

Department of the Treasury can successfully lead U.S. AML/CTFE efforts during the transition period and beyond.⁵⁰

C. *The USA PATRIOT Act*⁵¹

On October 26, 2001, President George W. Bush signed the USA PATRIOT Act into law.⁵² Title III of the Act, concerning efforts designed to combat international money laundering and terrorism financing, greatly strengthened the CTFE regime and even more fully incorporated AML schemes into it, such as through enhanced due diligence requirements.

Section 311 of the Act added a new section, 5318A, to the Bank Secrecy Act. This section gives the Secretary of the Treasury discretionary authority to impose one or more of five special measures on foreign jurisdictions or their institutions, foreign financial institutions, or one or more types of accounts, if he determines that the entity poses a "primary money laundering concern" to the United States. The special measures include: (1) requiring additional record-keeping or reporting for particular transactions; (2) requiring identification of the foreign beneficial owners of certain accounts at a U.S. financial institution; (3) requiring identification of customers of a foreign bank who use an interbank payable-through account opened by a foreign bank at a U.S. bank; (4) requiring the identification of customers of a foreign bank who use certain correspondent accounts opened by that foreign bank at a U.S. bank; and (5) after consultation with the Secretary of State, the Attorney General, and the Chairman of the Federal Reserve Board, restricting or prohibiting the establishment or maintenance of certain interbank correspondent or payable-through accounts. Measures (1) through (4) cannot be imposed for more than 120 days except by regulation, and measure (5) may only be imposed by regulation.

Section 313 added subsection (j) to 31 U.S.C. § 5318 to prohibit depository institutions and securities brokers and dealers operating in the United States from establishing, maintaining, administering, or managing correspondent accounts for foreign shell banks, other than shell bank vehicles affiliated with recognized and regulated depository institutions. On December 14, 2002, final rules were issued on obtaining certain information with respect to correspondent accounts for foreign shell banks.⁵³ As evidence that terrorist supporters use shell banks and correspondent accounts to collect and move money, Treasury cited its November 7, 2001, listing of Bank al-Taqwa, a Bahamian-based shell bank, as a terrorist financing source.⁵⁴

50. See Press Release, U.S. Department of Treasury, U.S. Treasury Department Announces New Executive Office for Terrorist Financing and Financial Crimes (Mar. 3, 2003), available at <http://www.ustreas.gov/press/releases/js77.htm>.

51. This section is derived substantially from Bruce Zagaris, *U.S. Enacts Counterterrorism Act with Significant New International Provisions*, 17 INT'L ENFORCEMENT L. REP. 522 (2001).

52. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

53. 31 C.F.R. § 103 (2002).

54. *The PATRIOT Act Oversight: Investigating Patterns of Terrorist Financing: Hearing Before the House Financial Subcomm. on Oversight and Investigations*, 108th Cong. 10 (2002)

Pursuant to section 314, the Secretary of the Treasury issued regulations on September 26, 2002, to encourage cooperation among financial institutions, financial regulators, and law enforcement officials, and to permit the sharing of information by law enforcement and regulatory authorities with those institutions regarding persons reasonably suspected, on the basis of credible evidence, of engaging in terrorist acts or money laundering activities.⁵⁵ The section also allows—with notice to the Secretary of the Treasury—the sharing among banks of information regarding possible terrorist or money laundering activity and requires the Secretary of the Treasury to publish a semi-annual report containing a detailed analysis of patterns of suspicious activity and other appropriate investigative insights derived from suspicious activity reports and law enforcement investigations. These provisions give financial institutions and their employees a “qualified” safe harbor protection from liability when they provide information to another institution about a former employee’s employment record.⁵⁶

Thus, Treasury significantly expanded the role of the Financial Crimes Enforcement Network (FinCEN), an information conduit between law enforcement and financial institutions.⁵⁷ To obtain customer account information, federal law enforcement agencies had merely to submit a form to FinCEN that required them only to identify the agency and certify that the information pertained to a case concerning money laundering or terrorism.⁵⁸ After it received the form, FinCEN would ask financial institutions and businesses to supply information on the relevant accounts or transactions.⁵⁹

However, the system proved problematic. Financial institutions received many information requests per day, often addressed to the wrong person, and had only a week to respond.⁶⁰ In response to complaints from the American Bankers Association,⁶¹ FinCEN stopped all such information requests from U.S. law enforcement agencies for four months in order to retool the system to give financial institutions more time and to solve other problems.⁶² Since then, the

(statement of Juan C. Zarate, Deputy Assistant Secretary, Terrorism and Violent Crime, U.S. Department of the Treasury).

55. 31 C.F.R. §§ 103.100, 103.110 (2002).

56. See Robert B. Serino, *Money Laundering, Terrorism, & Fraud*, ABA BANK COMPLIANCE 22 (Mar/April 2002).

57. See FINANCIAL CRIMES ENFORCEMENT NETWORK (FinCEN), 2003-2008 STRATEGIC PLAN (2003). Treasury has also promised to provide the financial sector with more information, such as typologies of money laundering or terrorist financing schemes and updates on the latest criminal trends. See Jimmy Gurulé, Under Secretary for Enforcement, Department of the Treasury, Speech Before the American Bankers’ Association Money Laundering Conference (Oct. 22, 2001), at <http://usembassy.state.gov/colombia/wwwsjg02.shtml>.

58. *To Relief of Many, U.S. Treasury Halts Flood of ‘314(a)’ Requests*, 14 MONEY LAUNDERING ALERT 1 (Dec. 2002).

59. *Id.*

60. *Progress Since 9/11: The Effectiveness of U.S. Anti-Terrorist Financing Efforts: Hearing Before the House Fin. Servs. Subcomm. on Oversight & Investigations*, 108th Cong. 5 (2003) (statement of John J. Byrne on behalf of the American Bankers Association).

61. See Letter from John J. Byrne, Senior Counsel and Compliance Manager, American Bankers Association, to Financial Crimes Enforcement Network, Special Information Sharing (Apr. 2, 2002), available at <http://www.aba.com>.

62. Press Release, Financial Crimes Enforcement Network, FinCEN to Reinstate USA PATRIOT Act Section 314(a) Information Requests (Feb. 6, 2003), available at <http://www.fincen.gov>.

system has been used to share the names of over 250 persons suspected of terrorist financing and has resulted in over 1,700 matches, 700 tips, and 500 case referrals that were passed on to law enforcement officials.⁶³ In addition, under its new CTFE powers, FinCEN has supported over 2,600 terrorism investigations and the expansion of the suspicious activity report regime has resulted in financial institutions filing over 2,600 such reports on possible terrorist financing.⁶⁴

Several sections of the USA PATRIOT Act broadened the reach of law enforcement and the judiciary. Section 315 amended 18 U.S.C. § 1956 to add foreign criminal offenses and certain U.S. export control violations, customs, firearm, computer, and other offenses to the list of crimes that are “specified unlawful activities” for purposes of the criminal money laundering provisions. The broadening of predicate offenses for criminalizing money laundering enabled U.S. prosecutors to help foreign law enforcement agencies who might otherwise have difficulty prosecuting someone or seizing funds outside their country.⁶⁵

Section 317 gave U.S. courts extraterritorial jurisdiction over foreign persons committing money laundering offenses in the United States, over foreign banks opening bank accounts, and over foreign persons who convert assets ordered forfeited by a U.S. court. It also permits a U.S. court dealing with such foreign persons to issue a pre-trial restraining order or take other action necessary to preserve property in the United States to satisfy an ultimate judgment. In addition, section 318 expands the definition of financial institution for purposes of 18 U.S.C. sections 1956 and 1957 to include those operating outside of the United States.

Section 319 amended U.S. asset forfeiture law⁶⁶ so that funds deposited by foreign banks in interbank accounts at U.S. banks are now treated as having been deposited in the United States for purposes of the forfeiture rules.⁶⁷ For example, if a terrorist has money in a foreign bank that has a correspondent account at a U.S. bank, a federal court can now order the U.S. bank to seize the foreign bank’s money. The foreign bank is then expected to recover its money by debiting the terrorist’s account.⁶⁸ The terrorist, but not the bank, can oppose

63. Aufhauser, *supra* note 39, at 8-9, 11.

64. *Id.* at 11.

65. *Dismantling the Financial Infrastructure of Terrorism: Hearing Before the House Comm. on Fin. Servs.*, 107th Cong. 7 (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice).

66. 18 U.S.C. § 981 (2001).

67. See *United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278* in *Banco Espanol de Credito, Spain*, 295 F.3d 23 (D.C. Cir. 2002) (upholding jurisdiction of U.S. courts to order forfeiture of property located in foreign countries); see also *The Financial War on Terrorism & the Administration’s Implementation of the Anti-Money Laundering Provisions of the USA PATRIOT Act: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs*, 107th Cong. 7 (2002) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice) (describing a case of Belizean money launderers whose assets were made recoverable by the Act).

68. See Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA PATRIOT Act of 2001*, 34 L. & POL’Y INT’L BUS. 7, 14 (2002).

the forfeiture action. The Attorney General and Secretary of the Treasury are authorized to issue a summons or subpoena to any such foreign bank and to seek records, wherever located, that relate to such a correspondent account.⁶⁹

Section 325 authorized the Secretary of the Treasury to issue regulations concerning the maintenance of concentration accounts by U.S. depository institutions to ensure such accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner.⁷⁰ Similarly, pursuant to section 326, the Secretary of the Treasury promulgated final rules establishing minimum standards for financial institutions and their customers regarding the identity of customers who open new accounts.⁷¹ The standards require financial institutions to verify customers' identities, consult with lists of known and suspected terrorists at account openings, and maintain records.

Finally, section 373 of the Act amended 18 U.S.C. § 1960 to prohibit unlicensed money services businesses. In addition, such businesses must file suspicious activity reports with law enforcement officials.⁷² Pursuant to section 356, the Secretary of the Treasury promulgated final rules requiring broker-dealers to also file suspicious activity reports.⁷³ In the future, Treasury will issue similar regulations regarding futures commission merchants, commodity trading advisors, commodity pool operators, and investment companies.

III. INTERNATIONAL ORGANIZATIONS

Intergovernmental organizations (IGOs) have played a key role in conceptualizing and creating the international AML and CTFE enforcement regimes through conventions, resolutions, and recommendations.⁷⁴ By establishing standards, mechanisms and institutions to deal with the transnational problems of money laundering and terrorist financing, they set the framework for the necessary international cooperation. Although these standards have traditionally been comprised of "soft law," in recent years IGOs have started to impose compliance regimes through evaluation mechanisms, "naming and shaming," and economic sanctions.

In particular, a major development in 2000 was the almost simultaneous issuance of blacklists against non-cooperative countries and territories. One after another, the Organisation for Economic Cooperation and Development is-

69. In relation to forfeiture, section 320 amended 18 U.S.C. § 981 to allow the United States to institute forfeiture proceedings against any proceeds of foreign predicate offenses located in the U.S., and section 323 allowed the government to seek a restraining order to preserve the availability of property subject to a foreign forfeiture confiscation judgment.

70. Treasury has not yet issued any such regulations.

71. 31 C.F.R. pt. 103 (2003).

72. *Id.*

73. *Id.*

74. For background on the work of international organizations in the AML realm, see WILLIAM C. GILMORE, *DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES* (2d ed. 1999).

sued its harmful tax competition initiative with a list of tax havens that did not agree to make a public commitment to bring their practices into compliance;⁷⁵ the Financial Stability Forum issued its report on offshore financial centers, classifying them into three levels of compliance with international standards;⁷⁶ and the Financial Action Task Force on Money Laundering issued its list of fifteen non-complying countries.⁷⁷ The simultaneous issuance of blacklists was an attempt to jumpstart the merging of the AML and CTFE regimes, conferring on soft laws a greater status in international law and politics.

However, since AML and CTFE laws have developed at such a rapid rate, there are inconsistencies in legislation, implementation, and enforcement that present difficulties for international cooperation. Further, legal systems differ in their organization, procedures, substantive law, and cultural traditions. A nation with an Islamic legal system and another rooted in the common law may have difficulty bridging differences in their concepts of the proper procedures and ultimate goals. Reaching an understanding on these issues can also be extremely difficult because privacy and confidentiality laws, along with AML and asset forfeiture statutes, often encompass competing societal objectives.

As IGOs continue to strive for uniform legislation for the AML regime, many of the gaps and obstacles that arise from conflicts of laws will be resolved. This will take time, however, since the normal course for creating international legal norms has been to agree initially on narrow sets of legal principles and policies and then to broaden them. Already, cooperation has increased substantially, especially in the western hemisphere, among regional groups that share similar institutions and legal systems, and that interact within a common criminal justice organization. Indeed, the efforts of IGOs such as the United Nations, the European Union, and the Financial Action Task Force on Money Laundering have been largely responsible for the international acceptance of the AML/CTFE regime.

A. Global Organizations

1. The United Nations

a. Conventions

The United Nations pioneered international AML cooperation with the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁷⁸ which requires signatories to criminalize money laundering and immobilize the assets of persons involved in illegal narcotics trafficking.

75. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TOWARDS GLOBAL TAX CO-OPERATION, REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES (2000).

76. FINANCIAL STABILITY FORUM, REPORT OF THE WORKING GROUP ON OFFSHORE FINANCIAL CENTRES (Apr. 5, 2000); see also BENNETT, *supra* note 21, at 159-63.

77. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW TO IDENTIFY NON-CO-OPERATIVE COUNTRIES OR TERRITORIES (June 22, 2000).

78. Dec. 19, 1988, SEN. TREATY DOC. NO. 101-4, 28 I.L.M. 47 (1989) (entered into force Nov. 11, 1990).

Because the Convention was an initial effort and the participating governments so diverse, there are differences in each country's criminalization of money laundering, extent of scienter required, enforcement methods, number of convictions, and range of punishments.⁷⁹ Nevertheless, subsequent efforts have drawn from the Vienna Convention and utilize wherever possible the same terminology and systematic approach.

The 1999 International Convention for the Suppression of the Financing of Terrorism prohibits direct involvement or complicity in the international and unlawful provision or collection of funds, attempted or actual, with the intent or knowledge that any part of the funds may be used to carry out any of the offenses described in the Convention, such as those acts intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, and any act intended to compel a government or an international organization to take action or abstain from taking action.⁸⁰ Offenses are deemed to be extraditable crimes, and signatories must establish their jurisdiction over them, make them punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite them, cooperate in preventive measures and countermeasures, and exchange information and evidence needed in related criminal proceedings.

The Convention also requires each signatory to take appropriate measures, in accordance with its domestic legal principles, for the detection, freezing, seizure, and forfeiture of any funds used or allocated for the purposes of committing the listed offenses.⁸¹ Article 18(1) requires signatories to subject financial institutions and other professionals to "Know Your Customer" requirements and the filing of suspicious transaction reports. Additionally, article 18(2) requires signatories to cooperate in preventing the financing of terrorism insofar as the licensing of money service businesses and other measures to detect or monitor cross-border transactions are concerned.

Another treaty with important AML/CTFE provisions is the 2000 Palermo Convention Against Transnational Organized Crime,⁸² which contains three supplementary protocols: one to prevent, suppress and punish trafficking in persons, especially women and children; another to stop the smuggling of migrants by land, sea and air; and a third to stop the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

This convention seeks to strengthen the power of governments to combat serious crimes by providing a basis for stronger common action against money laundering through synchronized national definitions of such crimes. Signatory countries pledge to: (1) criminalize offenses committed by organized crime

79. See UNITED NATIONS OFFICE ON DRUGS AND CRIME GLOBAL PROGRAMME AGAINST MONEY LAUNDERING, MODEL LEGISLATION ON LAUNDERING, CONFISCATION AND INTERNATIONAL COOPERATION IN RELATION TO THE PROCEEDS OF CRIME (1999).

80. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) (entered into force Apr. 10, 2002).

81. *Id.*

82. Convention Against Transnational Organized Crime, Dec. 12, 2000, U.N. Doc. A/55/383 (entered into force Sept. 29, 2003).

groups, including corruption and corporate or company offenses; (2) combat money laundering and seize the proceeds of crime; (3) accelerate and extend the scope of extradition; (4) protect witnesses testifying against criminal groups; (5) strengthen cooperation to locate and prosecute suspects; (6) enhance prevention of organized crime at the national and international levels; and (7) develop a series of protocols containing measures to combat specific acts of transnational organized crime. The signatories must establish regulatory regimes to deter and detect all forms of money laundering, including customer identification, record keeping, and reporting of suspicious transactions. In these respects, the Convention's provisions are similar to those found in the Forty Recommendations of the Financial Action Task Force on Money Laundering.⁸³

In addition to conventions, the U.N. Office on Drugs and Crime has drafted model laws such as the Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the Proceeds of Crime⁸⁴ and, in response to its expansion into the realm of CTFE, the Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill.⁸⁵ The Office on Drugs and Crime provides technical assistance on legislative drafting, financial intelligence, capacity building, and a range of services to help governments and law enforcement agencies implement their obligations under the Vienna Convention and related AML initiatives.⁸⁶

*b. Security Council Resolution 1373*⁸⁷

On September 12, 2001, the United Nations Security Council adopted Resolution 1368, condemning the attacks of the day before and calling on all states to work together to quickly bring to justice those who perpetrated them, as well as those "responsible for aiding, supporting or harbouring the perpetrators."⁸⁸ The resolution also called on the international community to increase efforts "to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions."⁸⁹ Finally, the resolution expressed the Security

83. See Paul Allan Schott, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM III-3, III-4 (2002).

84. U.N. OFFICE ON DRUGS AND CRIME, MODEL LEGISLATION ON LAUNDERING, CONFISCATION AND INTERNATIONAL COOPERATION IN RELATION TO THE PROCEEDS OF CRIME (1999).

85. U.N. OFFICE ON DRUGS AND CRIME, MODEL MONEY-LAUUNDERING, PROCEEDS OF CRIME AND TERRORIST FINANCING BILL (2003).

86. U.N. OFFICE ON DRUGS AND CRIME, GLOBAL PROGRAMME AGAINST MONEY LAUNDERING, available at http://www.unodc.org/unodc/en/money_laundering.html (last visited Jan. 24, 2004).

87. This section is derived substantially from Bruce Zagaris, *The United Nations Acts to Combat Terrorism*, 17 INT'L ENFORCEMENT L. REP. 469 (2001) and Bruce Zagaris, *UN Security Council Hears Progress of Counter-Terrorism Committee*, 18 INT'L ENFORCEMENT L. REP. 113 (2002).

88. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at § 3, U.N. Doc. S/RES/1368 (2001).

89. *Id.* at § 4. The resolutions especially to be adhered to included the specifically-mentioned Resolution 1269, S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053rd mtg., U.N. Doc. S/RES/1269 (1999) (encouraging nations to fight terrorism), as well as Resolution 1267, S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999) (demanding that the Taliban to deliver Osama bin Laden to international authorities), and Resolution 1333, S.C. Res. 1333, U.N.

Council's preparedness to take "all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism."⁹⁰

On September 28, 2001, the Security Council adopted the United States sponsored Resolution 1373, which called on all member states to: (1) prevent and suppress the financing of terrorism; (2) freeze without delay the resources of terrorists and terror organizations; (3) prohibit anyone from making funds available to terrorist organizations; (4) suppress the recruitment of new members by terrorism organizations and eliminate their weapon supplies; (5) deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe haven to terrorists; (6) afford one another the greatest measure of assistance in criminal investigations involving terrorism; (7) prevent the movement of terrorists or terrorist groups by effective border controls and control over travel documentation; and (8) cooperate in any campaign against terrorists, including one involving the use of force.⁹¹

While it contains strong language, the resolution still has gray areas, such as its failure to define the term "terrorist." Invoking Chapter 7 of the U.N. Charter, which requires all members states to cooperate and gives the Security Council authority to take action, including the use of force, against those who refuse to do so, the resolution drew on several commitments that have already been made in treaties and past resolutions and made them immediately binding on all member states.⁹² Many of its clauses require changes in national laws, such as those dealing with border controls and asylum.⁹³

From an implementation perspective, an important aspect of Resolution 1373 is the establishment of the Counter-Terrorism Committee (CTC) of the Security Council, consisting of each member of the Council, to monitor member states' implementation of the resolution.⁹⁴ The CTC is divided into three five-member subcommittees, each of which oversees one-third of the U.N. member states. All member states must report to the CTC on the steps they have taken toward implementation, and it is the duty of the CTC to review these reports and advise the appropriate subcommittees on whether it should follow up with a particular member state to achieve compliance with the resolution, and whether the member state requires assistance in that regard.⁹⁵ Although the CTC will not define terrorism in a legal sense, its work will help develop minimum standards for an international CTFE regime.

SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000) (demanding that the Taliban to stop supporting terrorism).

90. S.C. Res. 1368, *supra* note 88, at § 5.

91. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). No terrorist organizations were specifically cited in the resolution. *Id.*

92. Serge Schmemann, *U.N. Requires Members to Act Against Terror*, N.Y. TIMES, Sept. 29, 2001, at A1.

93. Human Rights Watch has noted the possibility that these changes may involve new and overbroad statutes that will impinge on basic liberties. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE, 4-5 (2003).

94. S.C. Res. 1373, *supra* note 91, at § 6.

95. COUNTER-TERRORISM COMMITTEE, HOW DOES THE CTC WORK WITH STATES?, at <http://www.un.org/Docs/sc/committees/1373/work.html> (last visited Jan. 24, 2004).

2. Financial Action Task Force on Money Laundering⁹⁶

In 1989, the G7⁹⁷ established the Financial Action Task Force on Money Laundering (FATF) to serve as an international clearinghouse for ideas and recommendations on how to curtail money laundering.⁹⁸ **But in keeping with the post-September 11 international trend of merging AML and CTFE regimes, the FATF has since expanded its mission to include efforts to stem terrorist financing. Operationally, the FATF relies on a sophisticated network of FATF-style regional bodies throughout the world⁹⁹ to elaborate typologies charting money laundering trends and formulate appropriate responses and mutual evaluations.**

The FATF's recently updated Forty Recommendations,¹⁰⁰ when combined with the eight Special Recommendations on Terrorist Financing,¹⁰¹ create a comprehensive laundry list of every major step nations and institutions should take to combat money laundering and terrorist financing. They cover ratification of international agreements, criminalization of relevant activities, due diligence requirements and the kinds of financial institutions that are bound to meet them, assistance to foreign countries, implementation of terrorist list sanctions, and so on. Each FATF member must self-assess its compliance with the Recommendations and report to the FATF, which will then "name and shame" non-cooperating countries and territories (NCCTs).¹⁰²

If an NCCT does not take effective measures to address and solve the problems the FATF views as non-compliance with the world AML/CTFE re-

96. This section is derived substantially from Bruce Zagaris, *FATF Adopts New Standards to Combat Terrorist Financing*, 17 INT'L ENFORCEMENT L. REP. 493 (2001).

97. The G7, now the G8 with the addition of Russia, was comprised of heads of state of the United States, Canada, Japan, France, Germany, Italy, Britain, and the European Community. G8 INFORMATION CENTER, WHAT IS THE G8?, at http://www.g7.utoronto.ca/what_is_g8.html (last modified Nov. 7, 2003).

98. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MORE ABOUT THE FATF AND ITS WORK, at http://www1.oecd.org/fatf/AboutFATF_en.htm (last modified Aug. 25, 2003). The FATF currently has 31 member countries and territories. *Id.*

99. These include the Caribbean FATF, the FATF in South America, the Asia/Pacific Group on Money Laundering, the Eastern and Southern Africa Anti-Money Laundering Group, and the MONEYVAL Committee. In addition to the organizations discussed herein, the G8, the G20, the International Monetary Fund, the World Bank, the World Customs Organization, the Commonwealth Secretariat, Europol, Interpol, the International Organization of Securities Commissions, the Financial Stability Forum, the Egmont Group of Financial Intelligence Units, the Basel Committee on Banking Supervision, the Offshore Group of Banking Supervisors, the European Central Bank, and various development banks play important roles in developing the international AML/CTFE regime through raising awareness, developing methodologies, building institutional capacity, and research and development. *Id.*

100. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (2003), at http://www1.oecd.org/fatf/40Recs_en.htm.

101. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, SPECIAL RECOMMENDATIONS ON TERRORIST FINANCING (2001), at http://www1.oecd.org/fatf/SRecsTF_en.htm.

102. For the current list of NCCTs, see FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, NON-COOPERATIVE COUNTRIES AND TERRITORIES, at http://www1.oecd.org/fatf/NCCT_en.htm#List (last visited Jan 26, 2004). In deciding whether or not to identify a country or territory as non-cooperative, the FATF considers twenty-five criteria; further criteria govern removal from the list of NCCTs. See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ANNUAL REVIEW OF NON-COOPERATIVE COUNTRIES OR TERRITORIES (2003), at http://www1.oecd.org/fatf/pdf/NCCT_2003_en.pdf.

gime, the FATF can recommend that counter-measures be taken against the NCCT. These sanctions punish entities located within NCCTs by establishing enhanced due diligence requirements for financial institutions that deal with them and notification to their business partners that they may be money launderers.¹⁰³ These measures have been in effect against Nauru since December 2001,¹⁰⁴ and other nations, such as Ukraine and Myanmar, have been threatened with them.¹⁰⁵ In 2002, the FATF, in partnership with the World Bank and International Monetary Fund, created a new methodology to assess nations' compliance with AML/CTFE standards, drawing heavily from the FATF's Forty Recommendations and eight Special Recommendations on Terrorist Financing, as well as international conventions.¹⁰⁶ The FATF will utilize this methodology in future NCCT evaluations and the International Monetary Fund and World Bank have included it as part of their own assessments of their members in pursuance of a one-year pilot program ending November 2003.¹⁰⁷

B. Regional Organizations

Regional organizations have been important actors in formulating and implementing AML and CTFE regimes. Organizations with universal membership can have difficulty designing and implementing policies and laws that are customized to the needs of various regions because each one has unique institutions, legal systems, and cultures. By working more closely with area states, a regional organization can gain the respect of governmental and non-governmental actors, increasing the level of its authority and effectiveness in accomplishing regional priorities. This cooperation is essential to the success of the new AML/CTFE regime.¹⁰⁸

1. Europe

The Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime obligates signatories to cooperate in the AML regime.¹⁰⁹ The European Union's Directive on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, amended

103. *Id.* at 23.

104. *Id.* at 19-20.

105. *Id.* at 19; Press Release, Financial Action Task Force on Money Laundering, FATF Decides to Impose Counter-Measures on Myanmar (Nov. 3, 2003), at http://www1.oecd.org/fatf/pdf/PR-20031103_en.pdf.

106. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, *METHODOLOGY FOR ASSESSING COMPLIANCE WITH ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM STANDARDS* (2002).

107. Press Release, International Monetary Fund, IMF Executive Board Approves 12-Month Anti-Money Laundering Pilot Project (Nov. 22, 2002).

108. For additional discussion of the interplay between national governments, and inter- and non-governmental organizations, see Bruce Zagaris, *International Money Laundering, in INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH TO THE MANAGEMENT OF COOPERATION* 138-42 (Robert S. Jordan ed., 2001).

109. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148 (1991) (entered into force Sept. 1, 1993).

in December 2001,¹¹⁰ is significant in its breadth; it applies due diligence requirements to numerous actors in the private sector, including lawyers and accountants, whenever they conduct a financial transaction or engage in financial planning. Because European nations dominate the FATF¹¹¹ and many other international organizations, their policies play a critical political role in the design and implementation of the AML/CTFE regime.

Ten days after the September 11 attacks on the United States, officials from the European Union (EU) member states met to show their solidarity. At the meeting, the European Council called for the broadest possible global coalition against terrorism, to act under the auspices of the U.N., and approved over thirty measures to expand the AML/CTFE regime in Europe.¹¹² These included agreements to introduce a Europe-wide arrest warrant,¹¹³ adopt a common definition of terrorism,¹¹⁴ create a list of known and presumed terrorists, establish joint investigative teams and make combating terrorism and its financing a higher law enforcement priority,¹¹⁵ implement all international AML/CTFE agreements as soon as possible,¹¹⁶ and support the Indian proposal to draft a comprehensive U.N. convention on international terrorism.¹¹⁷ The Council also called for each member state to establish a Financial Intelligence Unit, a central state agency serving as a clearinghouse for information related to money laundering.¹¹⁸

In 2002, the EU released its first list of terrorists, terrorist organizations, and their supporters, similar to the U.S. list.¹¹⁹ The regulations governing the

110. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 2001 O.J. (L 344/76).

111. See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, MEMBERS AND OBSERVERS, at http://www1.oecd.org/fatf/members_en.htm (last modified Oct. 6, 2003).

112. See Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, 2001 O.J. (SN 140/01) [hereinafter Council Meeting]; Peter Norman, *Stage Set for Leaders to Show Solidarity*, FIN. TIMES, Sept. 21, 2001, at 4; Peter Norman, *Stronger Ties Urged Between Police Forces*, FIN. TIMES, Sept. 21, 2001, at 4.

113. To enter into force on January 1, 2004. DIRECTORATE-GENERAL, JUSTICE AND HOME AFFAIRS, EUROPEAN COMMISSION, EUROPEAN ARREST WARRANT TO REPLACE EXTRADITION (2002).

114. See Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344/93), amended by Common Position 2003/651/CFSP, 2003 O.J. (L 229/42).

115. See, e.g., Press Release, The United States Mission to the European Union, U.S., E.U. Sign Legal Assistance, Extradition Treaty (June 25, 2003).

116. The six EU members that had not yet signed the International Convention for the Suppression of the Financing of Terrorism by the time of the meeting did so within one month after it. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, CHAPTER XVIII: PENAL MATTERS, 11, INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, at http://untreaty.un.org/ENGLISH/Status/Chapter_xviii/treaty11.asp (listing signatories) (last modified Nov. 7, 2003).

117. The proposal is currently being considered by a working group of the United Nations, along with a draft international convention for the suppression of acts of nuclear terrorism. *Report of the Working Group on Measures to Eliminate International Terrorism*, U.N. GAOR 6th Comm., 57th Sess., Agenda Item 160, U.N. Doc. A/C.6/57/L.9 (2002).

118. See Council Meeting, *supra* note 112; EGMONT GROUP OF FINANCIAL INTELLIGENCE UNITS, STATEMENT OF PURPOSE (June 13, 2001).

119. See Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin

EU list, however, also provide for greater safeguards against the mistaken listing of non-terrorists, including checks before listing, an appeals process, and sanctions for wrongly listing entities. They also except from freezing any funds related to everyday living as well as those used to cover legal costs.¹²⁰

2. *The Americas*

In 1996, the Organization of American States (OAS), comprised of all 35 independent nations in the Americas,¹²¹ established the Inter-American Drug Abuse Control Commission, to combat drug abuse, including through AML measures.¹²² To that end, the Commission wrote model regulations that include provisions regarding the establishment of Financial Intelligence Units and, after 2002, CTFE measures as well.¹²³ Also in that year, another OAS body, the Inter-American Committee Against Terrorism,¹²⁴ created the Inter-American Convention Against Terrorism, which includes many AML/CTFE provisions such as due diligence and mutual assistance requirements.¹²⁵ Together, these bodies operate training seminars, providing technical assistance to OAS member states, and release reports on the current state of the AML/CTFE regime in the Americas. They have also worked with the Inter-American Development Bank to fund member states' efforts to eliminate money laundering and the financing of terrorism.¹²⁶

The Caribbean Financial Action Task Force (CFATF), over a decade old, is one of the most active FATF-style regional bodies.¹²⁷ Often working together with the Caribbean Anti-Money Laundering Programme, it organizes symposia and training courses for regulators and private sector professionals to increase awareness and expertise within the region about AML and CTFE initiatives.¹²⁸ It has also created its own list of 19 Recommendations to mirror those of the

Laden, the Al-Qaida Network and the Taliban, 2002 O.J. (L 139/9) app. I, as amended, *available at* <http://europa.eu.int>; *see also* Council Regulation (EC) No 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism, 2001 O.J. (L 344/70), as amended, *available at* <http://europa.eu.int>.

120. *See id.*

121. ORGANIZATION OF AMERICAN STATES, ABOUT THE OAS, MEMBER STATES AND PERMANENT MISSIONS, *at* <http://www.oas.org/documents/eng/memberstates.asp> (last visited Jan. 26, 2004).

122. AG Res. 813, OAS AG, 16th Sess., OAS Doc. XVI-O/86 (1986).

123. INTER-AMERICAN DRUG ABUSE CONTROL COMMISSION, MODEL REGULATIONS CONCERNING LAUNDERING OFFENSES CONNECTED TO ILLICIT DRUG TRAFFICKING AND OTHER SERIOUS OFFENSES (2002).

124. AG Res. 1650, OAS AG, 29th Sess., OAS Doc. XXIX-O/99 (1999).

125. Inter-American Convention Against Terrorism, June 3, 2002, AG Res. 1840, OAS AG, 32nd Sess., OAS Doc. XXXII-O/02 (entered into force July 10, 2003).

126. For instance, in May 2001, the bank's Multilateral Investment Fund approved a \$1,230,000 grant to assist eight South American countries in their efforts to establish and improve their financial intelligence units. Press Release, Inter-American Development Bank, Multilateral Investment Fund Approves Financing to Fight Money Laundering in Latin America (June 26, 2002).

127. *See* CARIBBEAN FINANCIAL ACTION TASK FORCE, CFATF: AN OVERVIEW, *at* <http://www.cfatf.org> (last modified July 11, 2003).

128. *See, e.g.*, Press Release, CFATF Secretariat, IADB Project (Feb. 19, 2003), *at* http://www.cfatf.org/news/viewnews.asp?pk_news=12.

FATF, but tailored to meet the unique needs of the Caribbean region.¹²⁹ The prime focus of the CFATF, however, has been on drafting and testing typologies of money laundering in the fields of non-bank financial institutions, casinos and the gaming industry, international transactions; cyberspace, illegal trade in guns, free trade zones, and terrorist financing.¹³⁰ These typologies are then used to help craft the FATF's own typology reports.¹³¹

IV.

PROBLEMS OF ENFORCEMENT

A. *International Concerns*

Given the vast changes that occurred with the post-September 11 merging of the AML and CTFE regimes, it was clear that problems would arise. U.S. and international law enforcement agencies have experienced difficulties refocusing their efforts, keeping track of rapid and significant amendments to laws and new regulations, new partnerships and bureaucracies, as well as different perspectives in the international community. **Governments, organizations, and institutions have been wary of moving too quickly with the new regime for fear of alienating allies, violating fundamental rights to due process and privacy, and incurring burdensome costs.**

With regard to the international politics of the elaboration and implementation of the new AML/CTFE regime, some have claimed that the decision-making process was flawed. **This criticism is especially strong in the case of the three simultaneously released blacklists, which arguably suffered from: (1) the exclusion from most of the decision-making process of the very countries that are the targets of the policies; (2) a lack of adequate participation in policy-making and implementation by the private sector; (3) a general lack of transparency in the decision-making process; (4) the apparent use of economic sanctions and coercion in the way of blacklists without binding hard law; (5) deferential and favorable treatment of decision-making members whose own inadequacies have not resulted in blacklisting; (6) the apparent efforts to usurp critical policymaking from democratically elected governments without adequate participation by such governments; and (7) questionable substantive policy design.**¹³²

In the United States, the Treasury Department, pursuant to the USA PATRIOT Act, has issued hundreds of pages of complex regulations that force

129. CARIBBEAN FINANCIAL ACTION TASK FORCE, REVISED CFATF 19 RECOMMENDATIONS (1999), at <http://www.cfatf.org/documentation/docadmin.asp?mcat=15>.

130. See CARIBBEAN FINANCIAL ACTION TASK FORCE, THE CFATF MONEY LAUNDERING TYPOLOGY PROGRAMME PLAN OF ACTION (1998), at <http://www.cfatf.org/documentation/docadmin.asp?mcat=17>; CARIBBEAN FINANCIAL ACTION TASK FORCE, SUMMARY REPORT (2002) (discussing the results of the terrorist financing typology exercise).

131. See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES 2002-2003 (2003), at http://www1.oecd.org/fatf/pdf/TY2003_en.pdf.

132. See Bruce Zagaris, *Issues Low-Tax Regimes Should Raise When Negotiating with the OECD*, TAX NOTES INT'L 523 (2001); Press Release, CFATF Secretariat, Communiqué on the Conference on the International Financial Services Sector (Jan. 2, 2001).

banks and financial institutions, their counsel, and many other professionals to participate in law enforcement activities and regulatory processes. For instance, section 311, which allows Treasury to punish non-cooperative countries and territories, has the potential to alienate allies of the U.S. CTFE regime. It is highly subjective and thus susceptible to abuse for political purposes other than combating terrorism. Nations in the Americas claim that it is protectionist and aimed at scapegoating offshore financial centers.¹³³ Still, in April 2003, pursuant to section 311, Treasury issued a notice of proposed rulemaking requiring all U.S. financial institutions to terminate correspondent accounts with banks from the island of Nauru.¹³⁴

Concerns have also been raised about the act's effect on remittances, \$15 to \$20 billion of which are sent annually from the U.S. to Latin America and the Caribbean, mostly by immigrants who return money to their families.¹³⁵ Latin American immigrants living in the United States transfer an average of \$250 home to their native countries eight to ten times annually.¹³⁶ In fact, the present value of remittances to Latin America exceeds levels of official development assistance.¹³⁷ However, they are costly; transfer fees frequently amount to 20% of the sum being sent.¹³⁸ The act could make them even more expensive. Further, identification of U.S. immigrant customers can be difficult because many customers do not have reliable identification documents.¹³⁹ The Mexican Government has instituted a program to regularize identification issues, but U.S. states have not reacted uniformly.¹⁴⁰ Treasury must find the proper balance between achieving national security and law enforcement objectives, and leaving financial institutions free to serve their remittance customers at a reasonable price.¹⁴¹

As a result of the new laws, regulations, and lists of terrorists and persons assisting and associated with them, law enforcement agencies are investigating and prosecuting a host of individuals and entities. In assessing the success of AML/CTFE actions, the U.S. government cites the number of freezes, seizures,

133. See Associated Press, *New Scrutiny Weighs on Caribbean Offshore Business, but Critics Warn that Crimes Continue* (Feb. 14, 2003), available at http://www.acams.org/press/associated-press_021403.htm.

134. *U.S. Proposes Nauru Crackdown*, 14 MONEY LAUNDERING ALERT 8 (May 2003).

135. Sheila C. Bair, Assistant Secretary for Financial Institutions, U.S. Department of the Treasury, Remarks Before the Multilateral Investment/Inter-American Development Bank Second Regional Conference on Impact of Remittances as a Development Tool (Feb. 26, 2002).

136. *Id.*; see also ROBERTO SURO, ET AL., BILLIONS IN MOTION: LATINO IMMIGRANTS, REMITTANCES AND BANKING (2002).

137. MULTILATERAL INVESTMENT FUND & INTER-AMERICAN DEVELOPMENT BANK, SENDING MONEY HOME: AN INTERNATIONAL COMPARISON OF REMITTANCE MARKETS 6 (2003); see also MULTILATERAL INVESTMENT FUND & INTER-AMERICAN DEVELOPMENT BANK, REMITTANCES TO LATIN AMERICA AND THE CARIBBEAN: COMPARATIVE STATISTICS 15 (2001).

138. Bair, *supra* note 135.

139. Robyn Lamb, *Montgomery County Officials Ask All Banks in County to Accept Hispanic Gov't ID's*, DAILY RECORD, May 28, 2003.

140. Kathryn Lee Holloman, *The New Identity Crises: USA PATRIOT Act Customer Identification Programs and the Matrícula Consular as Primary Identification Documents for Mexican Nationals*, 7 N.C. BANKING INST. 125, 125-26, 128 n.37 (2003).

141. Bair, *supra* note 135.

and forfeitures, as well as the number of searches, prosecutions, and convictions they bring about.¹⁴² Essentially, this is an attempt to justify their work, but the measures can be misleading, falsely providing a sense of accomplishment when perhaps little of significance has actually been achieved.¹⁴³ While the United States and the international community may be able to disrupt some terrorist cells through CTFE actions, by itself the strategy has enormous limitations. Unlike those who engage in crimes such as the trafficking of narcotics or persons, terrorists are not generally motivated by and do not need much money—just a handful of dedicated amateurs can perpetrate great terror.¹⁴⁴ The Unabomber phenomenon demonstrated the ease with which one person without any network or money can wreak havoc for years.

Another issue affecting the success of the U.S. CTFE regime is the degree to which the international community is willing to commit to and cooperate with it. Whereas U.S. export control rules are largely unilateral,¹⁴⁵ the United States will need to rely more on international organizations and foreign governments to design, administer, and enforce sustainable AML and CFTE mechanisms.¹⁴⁶ In this regard, the executive orders and the USA PATRIOT Act pose serious problems. To succeed, U.S. prosecutors will need to exercise much discretion and diplomacy.

B. Case Studies¹⁴⁷

The United States has continued to add persons linked to Al Qaeda to its list of terrorists and terrorist supporters, including a number of charitable organizations, businesses, and individuals with close contacts to governments in the Middle East and Central Asia.¹⁴⁸ Early additions included three seemingly innocent businesses said to be Al Qaeda fronts: Al-Hamati Sweets Bakeries, Al-

142. See, e.g., Aufhauser, *supra* note 39, at 3-4, 8-9, 11.

143. See Peter L. Fitzgerald, *Drug Kingpins and Blacklists: Compliance Issues with US Economic Sanctions*, 4 J. MONEY LAUNDERING CONTROL 360 (2001) (explaining that the proliferation of multiple blacklists and export control regimes for diverse activities from terrorism to narcotics trafficking makes for enormous difficulty, both for the private sector and regulatory agencies).

144. See REX A. HUDSON, *THE SOCIOLOGY AND PSYCHOLOGY OF TERRORISM: WHO BECOMES A TERRORIST AND WHY?* 14-19 (1999). For a post-September 11th review of what it means to be a terrorist, see RAPHAEL PERL, *TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY* 4 (2003). Indeed, searching for terrorists has been said to be more difficult than “searching for the proverbial needle in the haystack; it is, rather, akin to searching for an indistinguishable needle among a stack of needles.” Lee Wolosky & Stephen Heifetz, *Regulating Terrorism*, 34 L. & POL’Y INT’L BUS. 1, 3 (2002).

145. This can create problems of its own. See LAW AND POLICY OF EXPORT CONTROLS: RECENT ESSAYS ON KEY EXPORT ISSUES 267-443 (Homer E. Moyer, Jr. et al. eds., 1993); BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* 252-54 (1988).

146. See Aufhauser, *supra* note 39, at 13-14.

147. This section is derived substantially from four articles by Bruce Zagaris: *U.S. and Other Countries Attack Against Additional List of Terrorist Supporters*, 17 INT’L ENFORCEMENT L. REP. 515 (2001); *Counterterrorism Financial Enforcement Produces Litigation and Controversy*, 18 INT’L ENFORCEMENT L. REP. 31 (2002); *U.S. and Allies Crack Down on 2 Money Transmitters*, 18 INT’L ENFORCEMENT L. REP. 32 (2002); and *Swedish Government Requests Review of 3 Somali Swedes on U.S. Terrorist List*, 18 INT’L ENFORCEMENT L. REP. 112 (2002).

148. See Joseph Kahn & Judith Miller, *U.S. Freezes More Accounts*, N.Y. TIMES, Oct. 13, 2001, at A1.

Nur Honey Press Shops, and Al-Shifa Honey Press. Mahmud Abu al-Fatih Muhammad, the owner of Al-Shifa, has been linked to the Islamic Cultural Institute in Milan, which U.S. officials characterize as “the main Al Qaeda station house in Europe” and which is allegedly used to “facilitate the movement of weapons, men and money across the world.”¹⁴⁹

Another politically sensitive entity included on the list is the Rabita Trust, a Pakistani charity of which Pakistan’s President General Pervez Musharraf was a board member.¹⁵⁰ The United States had warned Musharraf of the impending order and encouraged him to disassociate himself from the organization beforehand.¹⁵¹ Top Pakistani officials helped to establish Rabita, which aids resettled refugees from Bangladesh. According to a Pakistani news account, the Rabita Trust is affiliated with a much larger and better-known charity, usually called Rabita Alam-e-Islami, or the Muslim World League, which is headquartered in the holy city of Mecca and operates a multi-billion dollar budget contributed to by many wealthy Saudis.¹⁵² But Rabita is also headed by Wa’el Hamza Jalaidan, whom the U.S. Department of the Treasury characterized as the “logistics chief” and co-founder of Al Qaeda.¹⁵³

Lebanon’s Prime Minister, Rafik Hariri, refused U.S. requests to freeze assets belonging to Hezbollah, which his government claimed is a movement of national liberation and not a terrorist organization.¹⁵⁴ Syrian President Bashar al-Assad explained that his nation held the same view.¹⁵⁵ British officials said they would only freeze the assets of Hezbollah’s external security organization, which they considered a terrorist arm, but would not act against its political and social activities.¹⁵⁶ Another controversial group, Hamas, gained notoriety for suicide bombings against Israel but is also recognized for its charitable work in education and health.¹⁵⁷ Abdel Aziz Bouteflika, the Algerian president, expressed approval of CTFE actions but qualified his support by excluding Arab groups fighting Israel from any definition of terrorists.¹⁵⁸

The U.S. terrorist list also includes Saudi businessman Yasin al Qadi, also known as Yasin Kadi, a former director of the Muwafaq Foundation, or Blessed

149. John Willman & Richard Wolffe, *US Probe Takes Close Look at Trail of “Honey Money,”* FIN. TIMES, Oct. 13, 2001, at 3.

150. Charitable and other nonprofit organizations have increasingly come under the suspicion of law enforcement officials. See FATF, *COMBATING THE ABUSE OF NON-PROFIT ORGANISATIONS: INTERNATIONAL BEST PRACTICES* (2002).

151. Kahn & Miller, *supra* note 148.

152. David S. Hilzenrath & John Mintz, *More Assets on Hold in Anti-Terror Effort*, WASH. POST, Oct. 13, 2001, at A16.

153. *Id.*

154. See *Lebanon Refuses Plea by U.S. to Name Hezbollah as Terrorists*, N.Y. TIMES, Nov. 9, 2001, at B3 (mentioning separate statements by Lebanon President Emile Lahoud and the cabinet that Hezbollah is waging a legitimate campaign against Israeli occupation of Arab land).

155. Thor Valdmanis, *Militant Group: Israelis are Terrorists, Not Us*, USA TODAY, Nov. 5, 2001, at 6A.

156. Harvey Morris & Gareth Smyth, *Lebanon Set to Refuse to Freeze Terror Assets*, FIN. TIMES, Nov. 8, 2001, at 8.

157. See *id.*

158. James Drummond, *Algeria Backs U.S. on Anti-Terrorism Campaign*, FIN. TIMES, Nov. 7, 2001, at 12.

Relief, whose trustees have included some of Saudi Arabia's most prominent families. Al Qadi is part of a successful merchant family and his interests have extended to banking and diamonds, as well as charity: he endowed Pakistan's largest public hospital and a Saudi women's college.¹⁵⁹ But the U.S. Treasury Department alleged that Muwafaq sent millions of dollars from Saudi businesses to Osama bin Laden. Before including al Qadi's name, the Bush administration had consulted with European allies, but not with Saudi Arabia, which had informed the United States that it had searched for assets belonging to persons on the original terrorist list but had not been able to locate any. U.S. officials commented that Saudi Arabia had yet to formally instruct its banks to expeditiously seize such assets if they were found, and hence, they doubted the thoroughness of any purported search.¹⁶⁰ Nonetheless, although U.S. officials contemplated listing the Muwafaq Foundation itself, they compromised by only listing al Qadi.¹⁶¹

Al Qadi is now suing in the European Court of Justice to have his name removed from the list because there has been no independent review of the evidence against him.¹⁶² Among other arguments, he alleges the British Government breached the Human Rights Act by depriving him of the use and enjoyment of his properties and interfering "in a most grave and serious" way with his private life. In a statement to the court, al Qadi said he had never financially or otherwise supported any terrorist activities or any terrorist group or individual. In addition, he claimed that his inclusion on the list has caused him serious personal and professional prejudice and damage.¹⁶³

Two other organizations whose assets the U.S. government blocked were Al Taqwa and Al Barakaat.¹⁶⁴ The networks did business in over forty countries, including the United States, and, according to the White House, raised, managed, and distributed funds for Al Qaeda, arranged for the shipment of weapons, and provided terrorist supporters with Internet service, secure telephone communications, intelligence, and instructions.¹⁶⁵

Al Taqwa was a worldwide investment company that owned a bank in the Bahamas, as well as factories and other industrial plants. It offered thousands of clients investments that did not offend Islamic law, which forbids charging interest or owning anything connected with alcohol, weapons, gambling, or adultery. Youssef Nada, Al Taqwa's owner and a naturalized Italian citizen, denied any

159. Jimmy Burns, *Court Fight Over Frozen Assets*, FIN. TIMES, Nov. 9, 2001, at 4.

160. Khan & Miller, *supra* note 148.

161. Jeff Gerth & Judith Miller, *Philanthropist, or Fount of Funds for Terrorists?*, N.Y. TIMES, Oct. 13, 2001, at B3. See also Hilzenrath & Mintz, *supra* note 152.

162. Constant Brand, *EU Court Hears Terror Blacklist Case*, GUARDIAN UNLIMITED, Oct. 14, 2003, available at <http://www.guardian.co.uk/worldlatest/story/0,1280,-3263794,00.html>. According to al Qadi's lawyer, one of the prime allegations against his client is his brother's link to a listed "terrorist" group, even though he has no brothers. *Id.*

163. Burns, *supra* note 159.

164. Press Release, Office of the Press Secretary, Executive Office of the President, Fact Sheet: Shutting Down the Terrorist Financial Network (Nov. 7, 2001).

165. *Id.*

association with or assistance to terrorists.¹⁶⁶ He pointed out that the Swiss Banking Commission had audited his firm and found no evidence of money laundering or allowing other entities to use the company as a front. Nonetheless, the United States worked with its international allies to detain Nada for questioning, raid his offices, and seize records and money.¹⁶⁷ He is still under investigation for links to Al Qaeda and Saddam Hussein, the former leader of Iraq.¹⁶⁸

Al Barakaat became the largest remittance company in Somalia, a nation with no formal banking system and limited alternative sources of foreign exchange, by using an informal system to allow Somali expatriates to send money home to relatives.¹⁶⁹ The United States began scrutinizing Al Barakaat after it placed Al Itihaad, an Islamic Somali group, on a prior terrorist list. Despite rumors that Al Itihaad had connections with Al Qaeda and operating bases in Somalia, there was no concrete evidence.¹⁷⁰ Business partners found Al Barakaat a model corporation, perfectly honest and transparent in its accounts. The management of Al Barakaat claimed that its records proved their innocence.¹⁷¹ Nonetheless, the United States pressured its allies, including the Bahamas, the United Arab Emirates, Liechtenstein, and other European nations, to disrupt Al Barakaat's operations. Its funds were frozen, its offices raided, and an employee arrested.¹⁷² These actions forced the company to close, leaving behind a Somali remittance crisis and multi-million dollar debts to local Somalis and U.S. companies.¹⁷³

Similarly, when the United States transmitted its list of terrorists to the United Nations, the Swedish government objected and insisted on reviewing the cases of three Swedish citizens whom the United States had included as associates of Al Barakaat.¹⁷⁴ Pursuant to Resolution 1373, the Swedish government froze the accounts of the three Somali-born men, but it also requested means to ascertain whether or not they were guilty and how to provide some rule of law for reviewing the possibility that the men had, as they claimed, merely trans-

166. Donald G. McNeil, Jr., *Italian Arab Is Perplexed by Swiss Raid*, N.Y. TIMES, Nov. 8, 2001, at B8. Nada said he was a victim of guilt by association because he sometimes did business with members of the bin Laden family and is a member of the Egyptian Muslim Brotherhood. The Brotherhood is, however, not a violent group. Indeed, it has been criticized for renouncing *jihād*, has members in the Egyptian parliament, and is not listed by the United States as a terrorist organization. *Id.*

167. *Id.*; Dana Milbank & Kathleen Day, *Businesses Linked to Terrorists Are Raided*, WASH. POST, Nov. 8, 2001, at A1.

168. Michael Isikoff & Mark Hosenball, *Jihad's Long Reach*, MSNBC, Sept. 17, 2003, available at <http://www.msnbc.com/news/968210.asp?0sl=-21>.

169. See William Hall, et al., *Cash Movers Branded as Financiers of Terrorism*, FIN. TIMES, Nov. 8, 2001, at 10.

170. Mark Turner, *Barakat Pleads Innocent to U.S. 'Terror' Claim*, FIN. TIMES, Nov. 12, 2001, at 6.

171. Hall, *supra* note 169.

172. David E. Sanger & Kurt Eichenwald, *U.S. Moves to Cut 2 Financial Links for Terror Group*, N.Y. TIMES, Nov. 8, 2001, at A1.

173. Turner, *supra* note 170.

174. See Serge Schmemmann, *Swedes Take Up the Cause of 3 on U.S. Terror List*, N.Y. TIMES, Jan. 26, 2002, at A9.

ferred funds to their families in Somalia. The Swedish government also asked the sanctions committee of the U.N. Security Council to review their inclusion.¹⁷⁵

The case attracted much attention in Sweden at a time when Europeans were criticizing the United States for what they saw as human rights and due process violations, especially in relation to U.S. treatment of prisoners of war. Prominent Swedes began to collect funds for the group's legal fees in defiance of the sanctions, which not only require the freezing of funds, but also prohibit business deals with, or the channeling of funds to, persons on the list. A prominent Swedish attorney rose to represent the men, all respected citizens free of criminal records, and the candidacy of one of them, Abdirisak Aden, in the 2000 Swedish elections, brought additional publicity to the case.¹⁷⁶

Sweden's action focused attention on the lack of any judicial review of the inclusion of persons on the terrorist lists and any recourse to unfreeze assets.¹⁷⁷ The French government urged the Security Council to establish basic rules on CTFE efforts, including specific criteria for imposing sanctions, such as a direct link with Al Qaeda or the Taliban, and a mechanism for regularly reviewing the list. But the United States opposed both the Swedish review and the French initiative because it felt that explaining the basis for an entity's inclusion on the list would endanger its ability to gather further intelligence.¹⁷⁸

Eventually, the United States gave in and removed Aden and four other persons from the list.¹⁷⁹ Additionally, the U.S. government agreed to alleviate some of the harsh effect of its sanctions, in part by considering the appeals of governments whose citizens found themselves on the U.N. terrorist list.¹⁸⁰ The U.N. then instituted evidentiary requirements for listing allegedly terrorist entities and an appeals procedure providing for the removal of contested names from the list.¹⁸¹ Within the United States, the three-volume report of the Judicial Review Commission, established by Congress to review legal issues in U.S. export control laws, discussed in detail the due process concerns raised by the blacklisting of alleged terrorists without judicial review and recommending

175. *Id.*

176. *Id.*

177. Furthermore, countries in which terrorist funds may be frozen sometimes do not permit unfreezing without a court decision holding that the funds are not the instrumentalities and/or proceeds of crime. In Switzerland, funds are frozen and tied up for decades when governments allege them to be the proceeds of crime but then cannot ultimately show that they actually are. See Roger Thurow, *Frozen Terrorist Funds May Not Thaw Easily*, WALL ST. J., Nov. 14, 2001, at A1.

178. Schmemmann, *supra* note 174.

179. Press Release, 1267 Committee Approves Deletion of Three Individuals and Three Entities From its List, U.N. Doc. SC/7490 (2002), available at <http://www.un.org/News/Press/docs/2002/sc7490.doc.htm>. Except for one other person, no other person or entity has been removed from the list. For the most current version of the list, see 1267 COMMITTEE, THE NEW CONSOLIDATED LIST OF INDIVIDUALS AND ENTITIES BELONGING TO OR ASSOCIATED WITH THE TALIBAN AND AL-QAIDA ORGANISATION AS ESTABLISHED AND MAINTAINED BY THE 1267 COMMITTEE, available at <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

180. Carola Hoyos, *U.S. Backs Down Over 'Terror' Assets*, FIN. TIMES, Aug. 16, 2002, at 1.

181. SECURITY COUNCIL COMMISSION ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) at <http://www.un.org/Docs/sc/committees/1267Template.htm>; GUIDELINES OF THE COMMITTEE FOR THE CONDUCT OF ITS WORK (2003) at http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf

changes in the law to allow for it.¹⁸² Still, all three Swedish men have brought suit in the European Court of Justice, complaining they were listed without due process of law.¹⁸³

Over 150 nations, including Saudi Arabia, have publicly supported the CTFE regime.¹⁸⁴ The public designation of terrorists and terrorist supporters, and the blocking of their abilities to transmit and receive funds through international financial institutions, have been critical elements in the CTFE regime.¹⁸⁵ So far, the U.S. list has been updated more than 39 times and it currently includes almost 330 persons and organizations. With it, the U.S. government has frozen over \$136.8 million.¹⁸⁶ Still, the decision whether or not to include certain organizations on the lists reflects the fine line the U.S. government must walk between putting pressure on Muslim nations, such as Saudi Arabia and Pakistan, to work to drain terrorist finances, and not alienating those allies.

V.

CONCLUSION

During the last three or four years, governments and international organizations continued their active efforts to increase regulatory and criminal enforcement to stem the tide of transnational crime. These efforts were reflected in the criminalization of various business and financial transactions, the imposition of new due diligence measures on the private sector and the concomitant weakening of privacy and confidentiality laws, and strengthened penalties for non-compliance with regulatory efforts against the private sector and governments. These anti-money-laundering measures were brought into the fold of the counter-terrorism financial enforcement scheme following the September 11, 2001, terrorist attacks. Together, AML and CTFE regulations have coalesced into one regime constituting a new global financial architecture. How well this regime has fared, and how it can be improved, is the subject of the following discussion. I first relate my personal experiences as an international corporate lawyer and then offer my analysis on the current and future regimes.

A. *The Role of an International Corporate Lawyer*

The rapid pace of change in AML and CTFE law makes it difficult for international corporate lawyers to keep up with all the new regulations. For instance, two or three years ago the International Monetary Fund and World Bank had no money laundering departments or staff with an AML background. Now they both have both. New counsel must set new policies for the interna-

182. JUDICIAL REVIEW COMMISSION ON FOREIGN ASSET CONTROL, FINAL REPORT TO CONGRESS (2001). For a summary of the Commission's recommendations, see Bruce Zagaris, *U.S. Judicial Review Commission on Foreign Asset Control Recommends More Due Process*, 17 INT'L ENFORCEMENT L. REP. 69 (2001).

183. Brand, *supra* note 162.

184. See Spiegel, *supra* note 41.

185. Aufhauser, *supra* note 39, at 3.

186. *Id.* at 3-4; see OFAC List, *supra* note 37.

tional financial institutions, evaluate compliance by governments, and help provide technical assistance to governments in terms of drafting and critiquing AML laws, institutions, and overall AML regimes. Recently, the International Finance Corporation, an IMF/World Bank Group entity, hired its first counsel to specialize in AML law, who must practically start from scratch in achieving those objectives.

In my own practice, I spend much of my time evaluating national and international laws, advising on due diligence and voluntary disclosures for big transactions, conducting audits of companies, and checking whether a potential transaction with an entity may violate the prohibitions on doing business with one of the thousands of persons named on one of the many blacklists. And all of this in some fairly gray areas of the law. Increasingly, I work with foreign lawyers whose clients are about to receive a large inheritance or make a gift, or otherwise transfer money to family members. But they are uncertain as how to conduct a transaction within the confines of the myriad rules and often want advice on the AML and reporting rules before they or their clients do so. Working with multinational corporations can also present exciting challenges as they are accustomed to aggressive business and tax planning and yet cannot afford to violate AML and CTFE laws because the cost of a criminal conviction, or even defending a prosecution, is enormous.

Foreign governments that rely on offshore financial centers as a significant part of their economy are inherently tricky to work for now that they are reviled throughout the AML and CTFE spheres. On a few occasions I have represented criminal defendants accused of money laundering offenses due to their alleged abuse of offshore financial center vehicles. The U.S. government has also hired me a number of times to serve as a consultant and expert witness in cases involving abusive transactions at offshore financial centers. In one case, I consulted and served as an expert witness for a person who was fired for reporting too much wrongdoing while conducting an audit of a large broker-dealer's money laundering; he brought an arbitration action for wrongful dismissal.

In addition to the increased risk of liability, the vast number of gray areas in AML and CTFE law, especially at the nexus of U.S. and international and foreign law, also allow ample opportunity for corporations, their executives, and their inside and outside counsel and accountants, to conduct the same aggressive business and tax planning they engaged in before. For instance, corporate inversions to Bermuda with the use of tax treaty intermediaries in Luxembourg or Barbados and aggressive use of transfer pricing can still be accomplished. Indeed, despite the rapid growth of the new regime, the ease with which these transactions can be completed has increased due to inadequate regulatory oversight and insufficient leadership from the U.S. government.

B. *Improving the AML/CTFE Regime*¹⁸⁷

Unilateral action can present difficulties for international cooperation. In the days before September 11, the Bush administration gained the ire of much of the international community by rejecting numerous international proposals, even those to which the United States was already a party. These included the proposed U.N. convention on trafficking in small arms, the treaties banning landmines and atomic/biological/chemical weapons, the 1972 Anti-Ballistic Missile Treaty with Russia, the nuclear test ban, the accord to establish the International Criminal Court, and the Kyoto accord on global warming.¹⁸⁸ Following the attacks, the administration's designation of its prisoners in the "war on terror" as "enemy combatants," as well as its invasion of Iraq, prompted further international consternation.¹⁸⁹

What is necessary is a comprehensive approach to AML and CTFE efforts through a genuine and effective multilateral policy. The current mix of "hard law" conventions and statutes and "soft law" mutual evaluations provides a good framework for cooperation, so long as proceedings are open to all parties and countermeasures are fairly distributed. In this regard, the recent change at the FATF to allow for a comment period open to all persons prior to revising its Forty Recommendations¹⁹⁰ and the increased collaboration between it and the CFATF¹⁹¹ have shown promise of an AML/CTFE regime increasingly interested in working with all nations. Further, the establishment of common national institutions along with an international organization composed of representatives of those institutions, such as the Egmont Group of Financial Intelligence Units, greatly fosters cooperation and enhances knowledge.

Thus, international organizations are establishing increasingly more mechanisms to ensure the implementation of their newly created AML and CTFE requirements and to sanction nations, institutions, and persons who do not meet them. In looking at the future we must focus on the basic principles governing international cooperation, global efforts to combat money laundering and terrorist financing, and the rights and interests of persons affected by the AML/CTFE regime. Multilateral conventions must be implemented by international organizations with universal membership and transparent and democratic procedures, and they must mandate and effectively enforce adherence by all nations. Only then can they result in true law enforcement success in combating money laun-

187. This discussion is derived substantially from Bruce Zagaris, *Money Laundering: New Challenges and Emerging Issues*, THE 2002 COMMONWEALTH SECRETARIAT OXFORD CONFERENCE ON THE CHANGING FACE OF INTERNATIONAL CO-OPERATION IN CRIMINALS MATTERS IN THE 21ST CENTURY 199, 219-20 (Aug. 27-30, 2002).

188. Colum Lynch, *U.S. Fights U.N. Accord to Control Small Arms*, WASH. POST, July 10, 2001, at A1.

189. Tony Allen-Mills, *Camp X-ray Rewrites the Law of War*, SUNDAY TIMES OF LONDON, Jan. 13, 2002; CNN, *Cities Jammed in Worldwide Protest of War in Iraq*, Feb. 16, 2003, available at <http://www.cnn.com/2003/US/02/15/sprj.irq.protests.main>.

190. FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, REVIEW OF THE FATF FORTY RECOMMENDATIONS CONSULTATION PAPER (2002).

191. Bruce Zagaris, *Caribbean FATF Dialogues with IMF/World Bank on Proposed Methodology*, 19 INT'L ENFORCEMENT L. REP. 77 (2003).

dering and terrorism. But even then they cannot alone root out the underlying causes behind these phenomena, and indeed they can lead to abuses in other areas.

One can see the danger the AML/CTFE regime poses by considering the so-called "war on drugs." One part of the U.S. strategy was the Clinton administration's Plan Colombia, through which the United States, amongst other actions, sold the Colombian military helicopters to spray and destroy crops of narcotics.¹⁹² The plan, supposed to be international in nature and protective of human rights, proved lacking in both regards. President Clinton waived all but one of its human rights provisions in the name of national security. Then European leaders, concerned about the over-militarization of counter-narcotics efforts under the plan, agreed to fund only economic, peace, and human rights programs.¹⁹³ Following the attacks of September 11, the Bush administration expanded the plan to include counter-terrorism measures¹⁹⁴ and, in a break with long-standing tradition, allowed Colombia to use the U.S. aid not only for counter-narcotics purposes, but also to combat illegal armed forces.¹⁹⁵ Despite over thirty years of fighting, the U.S. Drug Enforcement Administration is still not winning its "war."¹⁹⁶

In the AML/CTFE context, the danger is similar. By describing CTFE efforts within the rhetoric of a "war on terrorism" and freezing the funds of suspected terrorists and terrorist "associates" without due process, the United States risks alienating its allies and violating human rights such as the right to privacy. Already, many Arabs and Arab-Americans have pulled their money out of U.S. institutions for fear of it being frozen as terrorist funds.¹⁹⁷ Further, dismantling organizations that have both military and charitable wings, such as Hamas,¹⁹⁸ without simultaneously providing adequate substitutes for the humanitarian assistance they otherwise provide, erodes public confidence in the justice of the cause. A proper balance must be struck between fundamental human rights and national security. In the long run, unless wealthy nations increase basic living standards and democratic institutions in the developing world, it will remain a breeding ground for crime and terrorism, the AML/CTFE regimes there will remain mostly symbolic, and those elsewhere less effective.

192. *Challenges for U.S. Policy Toward Colombia: Is Plan Colombia Working: Hearing Before the Senate Comm. on Foreign Relations*, 108th Cong. (2003) (statement of Robert B. Charles, Assistant Secretary for International Narcotics and Law Enforcement Affairs, U.S. Department of State) [hereinafter Charles].

193. HUMAN RIGHTS WATCH, *WORLD REPORT 2001* (2001).

194. See Charles, *supra* note 192.

195. HUMAN RIGHTS WATCH, *WORLD REPORT 2003* (2003).

196. Almost one of every four high school seniors smokes pot at least monthly and, in 2001, over seven times as many people died of drug-induced causes as from the September 11th terrorist attacks. See NATIONAL CENTER FOR HEALTH STATISTICS, *ILLEGAL DRUG USE*, at <http://www.cdc.gov/nchs/fastats/druguse.htm> (last modified Oct. 14, 2003); SEPTEMBER 11, 2001, *VICTIMS*, at http://www.september11victims.com/september11victims/victims_list.htm (last modified Oct. 11, 2003).

197. See Tony Karon, *Are Saudi Billions Leaving America?*, *TIME*, Aug. 23, 2002.

198. See *Counterterror Initiatives in the Terror Finance Program: Hearing Before the Senate Comm. on Banking, Housing & Urban Affairs*, 108th Cong. 5 (2003) (statement of E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, U.S. Department of State).

With regard to organized crime and terrorism, there are no silver bullets. The AML/CTFE regime is only one tool of many to respond to these deeply imbedded and powerful phenomena. Transnational terrorism reflects the reality of modern day discontents taking advantage of globalization and technology to employ maximum violence to achieve, as they hope, maximum social change. Organized crime extends from the old gangs of bandits roaming rural highways, through the days of Al Capone, to today's international traffickers in narcotics, people, firearms, etc.

It will thus take a great deal of time for the new regime to function. The sweeping transformations of law that have been adopted cannot be fully implemented overnight.¹⁹⁹ In the meantime, international legal systems must accommodate the diplomatic tensions that will inevitably arise due to competing national interests and priorities. Perhaps it was wrong to attempt to graft AML regulations onto the new CTFE regime. Since terrorist financing normally involves the disbursement and movement of small amounts of money often derived from legitimate or quasi-legitimate sources, the chances of financial institutions detecting such activities are negligible under a regulatory framework developed for far larger-scale transactions. Although financial institutions may be able to help reduce the funding available to terrorists to a limited extent, they must rely heavily on government terrorist lists to be of use.

Additionally, they must bear the burden of considerable new costs imposed by the ever expanding due diligence requirements, which constitute a quasi-privatization of law enforcement. Financial institutions and their employees, and ever more associated professionals, are on the front line of international efforts to stamp out money laundering, organized crime, and terrorism. To increase the confusion, most nations still have substantial unfinished AML work on all levels (legislative, executive, private, and so on), and now they must rapidly create a complicated CTFE regime out of thin air and attempt to make it comprehensible to the private sector, which is then subject to liability for misinterpreting any gray areas the law may contain. Thus the new AML/CTFE requirements are major resource burdens, both in terms of cost and administrative time and energy, and they come at a time of worldwide recession. Yet there are sanctions for those entities that cannot keep up with the fast pace of change. The degree of success with which governments will meet in their endeavors depends on the level of trust and credibility they can retain with financial institutions, as well as each other.

Thus, a United Nations convention on money laundering could give the AML regime an added boost of authority and quicken the pace of harmonization of national laws. In my view, an essential requirement of a successful AML/CTFE regime is the establishment of an institution with the authority and resources to help regulators and financial institutions on a daily basis to implement and administer rules. This could be the role of an Americas Committee on

199. One prospective solution is to require that future free trade and economic integration arrangements include up-front, as part of the document, more regulatory and enforcement mechanisms.

Crime Problems, which could operate under the auspices of the Organization of American States and be modeled after the Europe Committee on Crime Problems, which functions under the Council of Europe.²⁰⁰ It could also facilitate networking among professionals from the private sector, think tanks and academia, as well as government and law enforcement officials, and other stakeholders, in order to start a global community of laws based on shared values and interests.²⁰¹ Interested citizens could use it as a sounding board for their concerns and ideas.

At any rate, a fresh vision is required, one that includes pragmatism and restraint, as well as idealism. This was the sort of leadership Irving Tragen gave as Executive Secretary of the Inter-American Drug Abuse Control Commission. Trained in the law, Irving conceptualized and materialized innovative and visionary mechanisms for policy-making and implementation. Yet he was a diplomat's diplomat. An American, he spoke impeccable Spanish and was culturally sensitive to foreign politicians and dignitaries, always treating them with patience and deference. He knew how to accomplish his objectives in an inclusive manner, earning the trust and respect of the international community. As Irving did, we must roll up our sleeves and work together to develop effective institutions and a civil society in which a comprehensive criminal justice policy, national security, freedom, and good governance are essential and equally valued elements.

ABBREVIATIONS

AML	Anti-Money-Laundering
BSA	Bank Secrecy Act of 1970
CFATF	Caribbean Financial Action Task Force
CTC	Counter-Terrorism Committee
CTFE	Counter-Terrorism Financial Enforcement
EU	European Union
FATF	Financial Action Task Force on Money Laundering
FinCEN	Financial Crimes Enforcement Network
IGO	Intergovernmental Organization
NCCT	Non-Cooperative Country or Territory
OAS	Organization of American States

200. For a discussion of the European Council's Committee on Crime Problems, see Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551 (1991). For a discussion of a more comprehensive anti-crime regime development applied to the Americas, see Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT'L L.J. 1888 (1996); B. Zagaris & C. Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 119 (1986).

201. For a discussion of integration within the intra-Caribbean system and transnational functional relations, for example, in anti-narcotics action, justice and human rights, currencies, finance and banks, see CHRISTOPH MÜLLERLEILE, *CARICOM INTEGRATION: PROGRESS AND HURDLES*, A EUROPEAN VIEW 84-135 (Fitzroy Fraser trans., 1996).

TFOS	Terrorist Financing Operations Section
U.N.	United Nations
U.S.	United States
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001